UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

TERRANCE Y.,[1] Plaintiff, vs. KILOLO KIJAKAZI, ACTING COMMISSIONER OF SOCIAL SECURITY, Defendant.	No. 4:20-cv-05190-MKD ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ECF Nos. 21, 24

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 21, 24. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court grants Plaintiff's motion, ECF No. 21, and denies Defendant's motion, ECF No. 24.

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[1] To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id*. at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue,* 674 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §§

404.1502(a), 416.920(a). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id*. An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination." *Id*. at 1115 (quotation and citation omitted). The party appealing the ALJ's decision generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

FIVE-STEP EVALUATION PROCESS

A claimant must satisfy two conditions to be considered "disabled" within the meaning of the Social Security Act. First, the claimant must be "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be "of such severity that he is not only unable to do his previous work[,] but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. § 1382c(a)(3)(B).

The Commissioner has established a five-step sequential analysis to determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. § 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work

activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(b).

If the claimant is not engaged in substantial gainful activity, the analysis proceeds to step two. At this step, the Commissioner considers the severity of the claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from "any impairment or combination of impairments which significantly limits [his or her] physical or mental ability to do basic work activities," the analysis proceeds to step three. 20 C.F.R. § 416.920(c). If the claimant's impairment does not satisfy this severity threshold, however, the Commissioner must find that the claimant is not disabled. *Id.*

At step three, the Commissioner compares the claimant's impairment to severe impairments recognized by the Commissioner to be so severe as to preclude a person from engaging in substantial gainful activity. 20 C.F.R. § 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the enumerated impairments, the Commissioner must find the claimant disabled and award benefits. 20 C.F.R. § 416.920(d).

If the severity of the claimant's impairment does not meet or exceed the severity of the enumerated impairments, the Commissioner must pause to assess the claimant's "residual functional capacity." Residual functional capacity (RFC),

defined generally as the claimant's ability to perform physical and mental work activities on a sustained basis despite his or her limitations, 20 C.F.R. § 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

At step four, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing work that he or she has performed in the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of performing such work, the analysis proceeds to step five.

At step five, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing other work in the national economy. 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner must also consider vocational factors such as the claimant's age, education and past work experience. *Id.* If the claimant is capable of adjusting to other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. *Id.*

The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to

step five, the burden shifts to the Commissioner to establish that (1) the claimant is capable of performing other work; and (2) such work "exists in significant numbers in the national economy." 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

ALJ'S FINDINGS

On June 29, 2017, Plaintiff applied for Title XVI supplemental security income benefits alleging a disability onset date of January 1, 2017. Tr. 20, 83, 176-85. The application was denied initially, and on reconsideration. Tr. 102-10, 114-20. Plaintiff appeared before an administrative law judge (ALJ) on October 11, 2019. Tr. 38-68. On October 30, 2019, the ALJ denied Plaintiff's claim. Tr. 17-37.

At step one of the sequential evaluation process, the ALJ found Plaintiff has not engaged in substantial gainful activity since June 29, 2017, the application date. Tr. 21. At step two, the ALJ found that Plaintiff has the following severe impairment: lumbar degenerative disc disease. *Id.*

At step three, the ALJ found Plaintiff does not have an impairment or combination of impairments that meets or medically equals the severity of a listed impairment. Tr. 26. The ALJ then concluded that Plaintiff has the RFC to perform medium work with the following limitations:

> He can frequently stoop and climb ramps, stairs, ladders, or scaffolds. He must avoid occasional exposure to extreme cold temperatures and

> hazards (dangerous moving machinery and unprotected heights). He is limited to the performance of simple, routine tasks with a reasoning level of 3 or less due to physical impairments affecting concentration, persistence and keeping pace capabilities.

Tr. 26-27.

At step four, the ALJ found Plaintiff is unable to perform any past relevant work. Tr. 31. At step five, the ALJ found that, considering Plaintiff's age, education, work experience, RFC, and testimony from the vocational expert, there were jobs that existed in significant numbers in the national economy that Plaintiff could perform, such as laundry worker, industrial cleaner, and stores laborer. Tr. 32. Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the Social Security Act, from the date of the application through the date of the decision. Tr. 32-33.

On August 12, 2020, the Appeals Council denied review of the ALJ's decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying him supplemental security income benefits under Title XVI of the Social Security Act. Plaintiff raises the following issues for review:

1. Whether the ALJ properly evaluated the medical opinion evidence;

2. Whether the ALJ conducted a proper step-two analysis;

3. Whether the ALJ properly evaluated Plaintiff's symptom claims;

4. Whether the ALJ conducted a proper step-five analysis.

ECF No. 21 at 6-7.

DISCUSSION

A. Medical Opinion Evidence

Plaintiff contends the ALJ erred in his consideration of the opinions of N.K. Marks, Ph.D., Meneleo Lilagan, M.D., and Steven Rode, D.O. ECF No. 21 at 9-14.

As an initial matter, for claims filed on or after March 27, 2017, new regulations apply that change the framework for how an ALJ must evaluate medical opinion evidence. *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20 C.F.R. § 416.920c. The new regulations provide that the ALJ will no longer "give any specific evidentiary weight…to any medical opinion(s)…" *Revisions to Rules*, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R. § 416.920c(a). Instead, an ALJ must consider and evaluate the persuasiveness of all medical opinions or prior administrative medical findings from medical sources. 20 C.F.R. § 416.920c(a) and (b). The factors for evaluating the persuasiveness of medical opinions and prior administrative medical findings include supportability, consistency, relationship with the claimant (including length of the treatment,

frequency of examinations, purpose of the treatment, extent of the treatment, and the existence of an examination), specialization, and "other factors that tend to support or contradict a medical opinion or prior administrative medical finding" (including, but not limited to, "evidence showing a medical source has familiarity with the other evidence in the claim or an understanding of our disability program's policies and evidentiary requirements"). 20 C.F.R. § 416.920c(c)(1)-(5).

Supportability and consistency are the most important factors, and therefore the ALJ is required to explain how both factors were considered. 20 C.F.R. § 416.920c(b)(2). Supportability and consistency are explained in the regulations:

> (1) *Supportability.* The more relevant the objective medical evidence and supporting explanations presented by a medical source are to support his or her medical opinion(s) or prior administrative medical finding(s), the more persuasive the medical opinions or prior administrative medical finding(s) will be.
>
> (2) *Consistency.* The more consistent a medical opinion(s) or prior administrative medical finding(s) is with the evidence from other medical sources and nonmedical sources in the claim, the more persuasive the medical opinion(s) or prior administrative medical finding(s) will be.

20 C.F.R. § 416.920c(c)(1)-(2). The ALJ may, but is not required to, explain how the other factors were considered. 20 C.F.R. § 416.920c(b)(2). However, when two or more medical opinions or prior administrative findings "about the same issue are both equally well-supported ... and consistent with the record ... but are

not exactly the same," the ALJ is required to explain how "the other most persuasive factors in paragraphs (c)(3) through (c)(5)" were considered. 20 C.F.R. § 416.920c(b)(3).

The parties disagree over whether Ninth Circuit case law continues to be controlling in light of the amended regulations, specifically whether the "clear and convincing" and "specific and legitimate" standards still apply. ECF No. 24 at 9-11; ECF No. 25 at 1-2. "It remains to be seen whether the new regulations will meaningfully change how the Ninth Circuit determines the adequacy of [an] ALJ's reasoning and whether the Ninth Circuit will continue to require that an ALJ provide 'clear and convincing' or 'specific and legitimate reasons' in the analysis of medical opinions, or some variation of those standards." *Gary T. v. Saul*, No. EDCV 19-1066-KS, 2020 WL 3510871, at *3 (C.D. Cal. June 29, 2020) (citing *Patricia F. v. Saul*, No. C19-5590-MAT, 2020 WL 1812233, at *3 (W.D. Wash. Apr. 9, 2020)). "Nevertheless, the Court is mindful that it must defer to the new regulations, even where they conflict with prior judicial precedent, unless the prior judicial construction 'follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.'" *Gary T.,* 2020 WL 3510871, at *3 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981-82 (2005); *Schisler v. Sullivan*, 3 F.3d 563, 567-58 (2d Cir. 1993) ("New regulations at variance with prior judicial precedents are upheld

unless 'they exceeded the Secretary's authority [or] are arbitrary and capricious.'").

There is not a consensus among the district courts as to whether the "clear and convincing" and "specific and legitimate" standards continue to apply. *See, e.g.*, *Kathleen G. v. Comm'r of Soc. Sec.*, 2020 WL 6581012, at *3 (W.D. Wash. Nov. 10, 2020) (applying the specific and legitimate standard under the new regulations); *Timothy Mitchell B., v. Kijakazi*, 2021 WL 3568209, at *5 (C.D. Cal. Aug. 11, 2021) (stating the court defers to the new regulations); *Agans v. Saul*, 2021 WL 1388610, at *7 (E.D. Cal. Apr. 13, 2021) (concluding that the new regulations displace the treating physician rule and the new regulations control); *Madison L. v. Kijakazi*, No. 20-CV-06417-TSH, 2021 WL 3885949, at *4-6 (N.D. Cal. Aug. 31, 2021) (applying only the new regulations and not the specific and legitimate nor clear and convincing standard). This Court has held that an ALJ did not err in applying the new regulations over Ninth Circuit precedent, because the result did not contravene the Administrative Procedure Act's requirement that decisions include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." *See, e.g., Jeremiah F. v. Kijakazi*, No. 2:20-CV-00367-SAB, 2021 WL 4071863, at *5 (E.D. Wash. Sept. 7, 2021). Nevertheless, it is not clear that the Court's analysis in this matter would differ in any significant respect under the

specific and legitimate standard set forth in *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

1. Dr. Marks

On January 17, 2018 Dr. Marks conducted a psychological examination and rendered an opinion on Plaintiff's functioning for Washington DSHS. Tr. 337-42 (duplicate at 355-60). Dr. Marks diagnosed Plaintiff with major depressive disorder, recurrent episode, moderate; generalized anxiety disorder; persistent depressive disorder (dysthymia); and she noted diagnoses to be ruled out, including unspecified neurocognitive disorder, unspecified or unknown substance-related disorder, along with possible ADHD. Tr. 339. Dr. Marks opined Plaintiff has severe limits in his ability to set realistic goals and plan independently; marked limits in his ability to understand, remember, and persist in tasks by following detailed instructions, in his ability to learn new tasks, in his ability to perform routine tasks without special supervision, in his ability to communicate and perform effectively in a work setting, and in his ability to complete a normal workday and workweek without interruptions from psychologically based symptoms; he has moderate limitation in his ability to understand, remember, and persist in tasks by following very short and simple instructions, adapt to changes in a routine work setting, make simple work related decisions, be aware of normal hazards and take appropriate precautions, ask simple questions or request

assistance, and to maintain appropriate behavior in a work setting. Tr. 340. Dr. Marks opined Plaintiff's impairments have an overall moderate severity rating, were not primarily the result of alcohol or drug use within the past 60 days, and would persist following 60 days of sobriety, but also that chemical dependency assessment was recommended; she opined his impairments were expected to last 12 months with treatment. *Id.* She also recommended counseling, assistance with housing, case management and further assessment for chemical dependency and cognitive issues. *Id.* The ALJ found Dr. Marks' opinion unpersuasive.

The ALJ found "despite finding numerous moderate and marked limitations in basic work activity, and a severe limitation … yet overall severity was considered only moderate, which appears internally inconsistent and may reflect Dr. Marks' own ambivalence about her assessment." Tr. 25. Supportability is one of the most important factors an ALJ must consider when determining how persuasive a medical opinion is. 20 C.F.R. § 416.920c(b)(2). The more relevant objective evidence and supporting explanations that support a medical opinion, the more persuasive the medical opinion is. 20 C.F.R. § 416.920c(c)(1). The ALJ explained that Dr. Marks noted "his description of symptoms was vague, and that chemical dependence factors could not be ruled out as contributing to his report of memory and cognitive problems"; and that she made a disclaimer that her findings

were based on Plaintiff's self-report along with clinical presentation at the time of the evaluation and that, as such, other sources should also be considered. Tr. 25.

First, the ALJ found Dr. Marks' opinion internally inconsistent because she determined overall severity was moderate. *Id.* Plaintiff contends that Dr. Marks' determination of overall moderate severity is consistent with her individual findings because Dr. Marks found numerous moderate limitations; Plaintiff points out "Dr. Marks assessed moderate limitations in six out of 12 basic work activities (50[percent]) …." ECF No. 21 at 11. The ALJ acknowledges Dr. Marks found several moderate limitations and does not explain how Dr. Mark's finding of overall moderate severity is internally inconsistent with her assessment or how this reflects her ambivalence with her assessment. *See* Tr. 25. The ALJ's conclusory statements fail to meet the burden of "setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Trevizo v. Berryhill*, 871 F.3d 644, 675 (9th Cir. 2017) (internal citations omitted). The ALJ's conclusion that Dr. Marks' determination was internally inconsistent because she found overall moderate severity is not supported by substantial evidence.

The ALJ also concluded that her determination of overall moderate severity may reflect Dr. Marks' ambivalence about her assessment because "she noted his description of symptoms was vague and that chemical dependence factors could

not be ruled out as contributing to this memory and cognitive problems." Tr. 25. However, Dr. Marks uses the term vague only once in her evaluation, to note Plaintiff's "description was vague" concerning past ADD symptoms or diagnosis under "Medical/Mental Health Treatment History," and this does not support a conclusion Dr. Mark was overall ambivalent with her assessment. Tr. 337. As for chemical dependency, Dr. Marks indicated that he presented with "memory problems, cognitive problems," and that "[chemical dependency] factors could not be ruled out as a contributing factor" although she indicated he "was not under the influence today." Tr. 337-38. She also explained that the cognitive or memory problems he presented with "may be the result of head injuries from bike accident or [chemical dependency] factors. Further assessment recommended." Tr. 339. Upon mental status testing, Dr. Marks observed several abnormalities including poorly organized speech, minimal eye contact, hopeless attitude, depressed and anxious mood and affect, along with poor long term memory, fund of knowledge, and concentration; her assessed limitations appear within the range of her findings upon clinical interview and abnormal findings upon mental status exam, and the ALJ does not explain how her opinion concerning possible cognitive impairment or chemical dependency is internally inconsistent or ambivalent. *See* Tr. 341-42.

Additionally, the ALJ did not assess the consistency of Dr. Marks' 2018 opinion with her findings from a 2016 evaluation. In 2016, Dr. Marks diagnosed

him with major depression, severe, while in 2018 her diagnosis was major depressive disorder, moderate. *Compare* Tr. 339, Tr. 251. Dr. Marks assessed overall marked limitations in 2016, with recommendations including immediate intervention for depression, and she noted he should be monitored for increasing suicidality. Tr. 352. Dr. Marks diagnoses in 2016 also included an alcohol related disorder in patrial remission. Tr. 351. The ALJ did not discuss her 2016 opinion, however, concluding that it was irrelevant because it was outside the period at issue and "listed alcohol problems …while not separating out the [Plaintiff's] functional abilities from the substance use disorder." Tr. 26. As Plaintiff points out, if chemical dependency in the past or during the period at issue contributes to his mental health impairments, the ALJ must consider whether the limitations remain in the absence of such use. ECF No. 21 at 12. Without discussion of the consistency of Dr. Mark' opinion with the longitudinal record, the Court is unable to meaningfully review whether the ALJ's interpretation of the evidence, rather than Dr. Mark's opinion, is rational. *See Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015). The ALJ does not explain why Dr. Marks' opinion of overall moderate limitation in 2018 reflects ambivalence about her assessment, and this finding is not supported by substantial evidence.

The ALJ also found that Dr. Marks' opinion was internally inconsistent because she made a disclaimer that her evaluation was based on plaintiff's self-

reports and clinical presentation at the time of the interview, and that as such other sources in addition to this report should be considered. Tr. 25 (citing Tr. 337). Plaintiff contends this language was not authored by Dr. Marks but is "preprinted standard form language" on the DSHS forms. ECF No. 21 at 12. The Court notes that Dr. Marks' 2016 evaluation also contains this language, but a 2014 evaluation by Dr. Moon does not. *See* 349-54, 299-303. A clinical interview and mental status evaluation are objective measures and cannot be disregarded as mere self-report. *See Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017). Here, Dr. Marks performed a clinical interview and administered psychological testing including Beck depression and anxiety testing and performed a mental status exam. *See* Tr. 337-42. There is no evidence of malingering and Dr. Marks noted Plaintiff was cooperative. Tr. 341. The ALJ did not explain how Dr. Marks' inclusion of a general statement that her evaluation was based on client's self-report along with clinical presentation at the evaluation shows her opinion is internally inconsistent or reflects ambivalence about her 2018 assessment, and the ALJ's conclusions are not supported by substantial evidence.

Additionally, the ALJ did not assess the consistency of Dr. Marks' 2018 opinion with evidence from other sources in the longitudinal record, including the opinion of Dr. Lewis, which the ALJ did not consider in his decision. Tr. 343-45. Consistency is one of the most important factors an ALJ must consider when

determining how persuasive a medical opinion is. 20 C.F.R. § 416.920c(b)(2). The more consistent an opinion is with the evidence from other sources, the more persuasive the opinion is. 20 C.F.R. § 416.920c(c)(2). A few weeks after Dr. Marks' January 2018 evaluation, Janis Lewis, Ph.D. completed a Review of Medical Evidence. *Id.* Dr. Lewis reviewed Dr. Marks' evaluation, noting she "didn't mark limitation c. [Perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances]. I opined a marked severity[,]"; Dr. Lewis also increased Plaintiff's overall severity rating, noting "changed overall severity to marked from moderate, based on the severity of [Plaintiff's] symptoms as written on the evaluation, his 5 marked [mental health] limitations plus one severe limitations, [sic] his 'chronic serious anxiety' and the likelihood of cognitive deficits." Tr. 343-45. Dr. Lewis' 2018 opinion is labeled a "new decision," *see* Tr. 344, and appears to amend or replace Dr. Mark' opinion. The ALJ did not discuss the opinion of Dr. Lewis and failed to assess the consistency of Dr. Marks' opinion with the longitudinal record, as required by the regulations, and his conclusions are not supported by substantial evidence.

On remand, the ALJ is instructed to reconsider Dr. Marks' opinions, along with considering the opinion of Dr. Lewis and any other mental health opinions in the record, using the factors of consistency and supportability as required by the

regulations. The ALJ is to incorporate the limitations into the RFC or give reasons supported by substantial evidence to reject the opinions.

2. Dr. Lilagan

In January 2018, Dr. Lilagan conducted a physical functional evaluation and rendered an opinion on Plaintiff's functioning for Washington DSHS. 362-65. Dr. Lilagan's impression was low back pain with left sciatica and left clavicular pain, with history of left clavicle fracture. Tr. 363. He opined Plaintiff had moderate limitation in his ability to stand, walk, lift, carry, handle, push, pull, reach, stoop, and crouch due to low back pain/sciatica; and moderate limitation in his ability to lift, carry, handle, push, pull, and reach due to left clavicular pain. *Id.* Dr. Lilagan opined that Plaintiff was capable of performing sedentary work and estimated that the current limitation on work activities would persist with available treatment for six months. Tr. 364. He further opined Plaintiff needed an orthopedic consult due to his reports of tingling and numbness in his left lower extremity and his left clavicle issues. *Id.* The ALJ did not address Dr. Lilagan's opinion.

Plaintiff contends the ALJ erred by failing to discuss Dr. Lilagan's opinion, pointing out had the ALJ fully credited Dr. Lilagan's opinion, he would have reached a different disability determination. *See* ECF No 21 at 12-13. Defendant concedes that the ALJ did not discuss the opinion, but argues any error was harmless because Dr. Lilagan's limitations were only temporary. ECF No. 24 at

14. Under the regulations, the ALJ must evaluate medical opinions using the factors listed in 20 C.F.R. § 416.920c. Additionally, the ALJ is required to consider "all medical opinion evidence." *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). While "[T]he ALJ is the final arbiter with respect to resolving ambiguities in the medical evidence," *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008), the ALJ must also meet his burden of "setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Trevizo v. Berryhill*, 871 F.3d 644, 675 (9th Cir. 2017) (internal citations omitted).

Given the matter is being remanded for the ALJ to reevaluate the opinion of Dr. Marks and to consider the opinion of Dr. Lewis, upon remand the ALJ is also directed to consider Dr. Lilagan's opinion. The ALJ is to incorporate the limitations into the RFC or give reasons supported by substantial evidence to reject the opinion.

3. Dr. Rode

In November 2017, Dr. Rode conducted a physical consultative evaluation and rendered an opinion on Plaintiff's functioning. Tr. 331-35. Dr. Rode diagnosed him with "sacral pain with low back pain with a history of motor vehicle accident," and "joint pains with a history of collar bone fracture with subtle deformity but normal range of motion." Tr. 334. He opined Plaintiff had no limit

in his ability to stand and walk and could sit for six hours in an eight hour workday. Tr. 335. The ALJ found Dr. Rode's opinion mostly persuasive.

Plaintiff contends the ALJ erred by relying on Dr. Rode's opinion because Dr. Rode did not review imaging after 2014, and imaging taken the day of his 2017 evaluation demonstrated "advanced progression of [Plaintiff's] lumbar conditions." ECF No. 21 at 14. Defendant contends the ALJ reasonably assessed Dr. Rode's opinion and the ALJ took the x-rays into consideration when he included greater limitations than those assessed by Dr. Rode. ECF No. 24 at 14-16.

Given the matter is being remanded for the ALJ to reevaluate other medical opinions, the ALJ is also directed to reconsider Dr. Rode's opinion.

Upon remand, the ALJ is instructed to reconsider all medical opinion evidence using the factors of supportability and consistency as required by the regulations, and to incorporate the limitations into the RFC or give reasons supported by substantial evidence to reject the opinions.

B. Step Two

Plaintiff contends the ALJ erred by failing find Plaintiff's mental health impairments severe. ECF No. 21 at 14-16. At step two of the sequential process, the ALJ must determine whether the claimant suffers from a "severe" impairment,

i.e., one that significantly limits her physical or mental ability to do basic work activities. 20 C.F.R. § 416.920(c).

To establish a severe impairment, the claimant must first demonstrate that the impairment results from anatomical, physiological, or psychological abnormalities that can be shown by medically acceptable clinical or laboratory diagnostic techniques. 20 C.F.R. § 416.921. In other words, the claimant must establish the existence of the physical or mental impairment through objective medical evidence (*i.e.*, signs, laboratory findings, or both) from an acceptable medical source; the medical impairment cannot be established by the claimant's statement of symptoms, a diagnosis, or a medical opinion. 20 C.F.R. § 416.921.

An impairment may be found to be not severe when "medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work…." Social Security Ruling (SSR) 85-28 at *3. Similarly, an impairment is not severe if it does not significantly limit a claimant's physical or mental ability to do basic work activities; which include walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; seeing, hearing, and speaking; understanding, carrying out and remembering simple instructions; responding appropriately to supervision, coworkers, and usual work situations; and dealing

with changes in a routine work setting. 20 C.F.R. § 416.922(a); SSR 85-28.[2]

Step two is "a de minimus screening device [used] to dispose of groundless claims." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). "Thus, applying our normal standard of review to the requirements of step two, [the Court] must determine whether the ALJ had substantial evidence to find that the medical evidence clearly established that [Plaintiff] did not have a medically severe impairment or combination of impairments." *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005).

As the case is being remanded for the ALJ to reconsider the medical opinion evidence, the ALJ is also instructed to reconsider the step-two analysis.

C. Plaintiff's Symptom Claims

Plaintiff faults the ALJ for failing to rely on reasons that were clear and convincing in discrediting his symptom claims. ECF No. 21 at 16-20. An ALJ engages in a two-step analysis to determine whether to discount a claimant's testimony regarding subjective symptoms. SSR 16–3p, 2016 WL 1119029, at *2. "First, the ALJ must determine whether there is objective medical evidence of an

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[2] The Supreme Court upheld the validity of the Commissioner's severity regulation, as clarified in SSR 85-28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987).

underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted). "The claimant is not required to show that [the claimant's] impairment could reasonably be expected to cause the severity of the symptom [the claimant] has alleged; [the claimant] need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the rejection." *Ghanim*, 763 F.3d at 1163 (citations omitted). General findings are insufficient; rather, the ALJ must identify what symptom claims are being discounted and what evidence undermines these claims. *Id*. (quoting *Lester*, 81 F.3d at 834; *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently explain why it discounted claimant's symptom claims)). "The clear and convincing [evidence] standard is the most demanding required in Social Security cases." *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm'r of Soc. Sec. Admin*., 278 F.3d 920, 924 (9th Cir. 2002)).

Factors to be considered in evaluating the intensity, persistence, and limiting effects of a claimant's symptoms include: 1) daily activities; 2) the location, duration, frequency, and intensity of pain or other symptoms; 3) factors that

precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and side effects of any medication an individual takes or has taken to alleviate pain or other symptoms; 5) treatment, other than medication, an individual receives or has received for relief of pain or other symptoms; 6) any measures other than treatment an individual uses or has used to relieve pain or other symptoms; and 7) any other factors concerning an individual's functional limitations and restrictions due to pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §416.929I. The ALJ is instructed to "consider all of the evidence in an individual's record," to "determine how symptoms limit ability to perform work-related activities." SSR 16-3p, 2016 WL 1119029, at *2.

The ALJ found that Plaintiff's medically determinable impairments could reasonably be expected to cause the alleged symptoms, but that Plaintiff's assertion of total disability under the Social Security Act is not supported by the weight of the evidence. Tr. 28.

As the case is being remanded for the ALJ to reconsider the medical opinion evidence, the ALJ is also instructed to reconsider Plaintiff's symptom claims in the context of the entire record.

E. Step Five

Plaintiff contends the ALJ erred at step five. ECF No. 21 at 20. At step five of the sequential evaluation analysis, the burden shifts to the Commissioner to

establish that 1) the claimant can perform other work, and 2) such work "exists in significant numbers in the national economy." 20 C.F.R. § 416.960(c)(2); *Beltran*, 700 F.3d at 389. In assessing whether there is work available, the ALJ must rely on complete hypotheticals posed to a vocational expert. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ's hypothetical must be based on medical assumptions supported by substantial evidence in the record that reflects all of the claimant's limitations. *Osenbrook v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001). The hypothetical should be "accurate, detailed, and supported by the medical record." *Tackett*, 180 F.3d at 1101.

Plaintiff contends the ALJ erred by failing to conduct an adequate analysis at step five, based on the failure to address Dr. Lilagan's opinion limiting Plaintiff to sedentary work. ECF No. 21 at 20. As the case is being remanded for the ALJ to reconsider the medical opinion evidence, the ALJ is also instructed to perform the five-step analysis anew, including reconsidering the step-five analysis.

F. Remedy

Plaintiff urges this Court to remand for an immediate award of benefits. *Id.* "The decision whether to remand a case for additional evidence, or simply to award benefits is within the discretion of the court." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)). When the Court reverses an ALJ's decision for error, the Court "ordinarily must

remand to the agency for further proceedings." *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) ("the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"); *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social Security cases, the Ninth Circuit has "stated or implied that it would be an abuse of discretion for a district court not to remand for an award of benefits" when three conditions are met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the credit-as-true rule, where (1) the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand, the Court will remand for an award of benefits. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017). Even where the three prongs have been satisfied, the Court will not remand for immediate payment of benefits if "the record as a whole creates serious doubt that a claimant is, in fact, disabled." *Garrison*, 759 F.3d at 1021.

Here, the Court finds further proceedings are necessary to resolve conflicts in the record, including conflicting medical opinions. As such, the case is remanded for further proceedings consistent with this Order.

CONCLUSION

Having reviewed the record and the ALJ's findings, the Court concludes the ALJ's decision is not supported by substantial evidence and not free of harmful legal error. Accordingly, **IT IS HEREBY ORDERED**:

1. Plaintiff's Motion for Summary Judgment, **ECF No. 21**, is **GRANTED**.

2. Defendant's Motion for Summary Judgment, **ECF No. 24**, is **DENIED**.

3. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff REVERSING and REMANDING the matter to the Commissioner of Social Security for further proceedings consistent with this recommendation pursuant to sentence four of 42 U.S.C. § 405(g).

The District Court Executive is directed to file this Order, provide copies to counsel, and **CLOSE THE FILE**.

DATED March 31, 2022.

s/Mary K. Dimke
MARY K. DIMKE
UNITED STATES DISTRICT JUDGE